No. 91-1673

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1991

ELAINE A. (BECKNER) CONNORS,
ADMINISTRATRIX, PETITIONER

V.

HOWARD JOHNSON COMPANY, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MASSACHUSETTS SUPREME JUDICIAL
COURT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

ELAINE A. (BECKNER) CONNORS
PRO SE PETITIONER
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May 21, 1992

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STATUTES

Seventh Amendment U. S. Constitution	2,6,8
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Petitioner, Elaine A. Connors (F/K/A Elaine A. Beckner), Administratrix of the Estate of Paul H. Beckner, brought this suit against the Howard Johnson Company ("Howard Johnson") to recover damages sustained following the death of Beckner for Beckner's estate.

Howard Johnson has carefully avoided any reference to prior decisions of the Massachusetts Courts upholding the fact that the statutes of limitations for contracts under seal are governed by Mass. General Law 260, S 12, which is twenty years.

The Massachusetts Appeals Court did not agree with the Trial Judge that the statute of limitations had expired or with her interpretation of the written contract. The Appeals Court decision was based on their interpretation of the

written contract, which they state, cannot be read, that Beckner restricted the use of his early formulas, when in fact that is exactly how it should have been read, considering the evidence at the trial. There was evidence that the contract Beckner had signed did not cover the entire agreement between the parties. Contrary to the Appeals Court decision, the contracts entered into evidence were not identical.

Had the Trial Judge denied motion for judgement notwithstanding the verdict and upheld what appeared to be a unanimous jury decision for Connors, it is very probable that this case may never have reached the Massachusetts Appeals Court. There would have been no violation of Connors' Seventh Amendment Rights and the violation of Due Process under the Fourteenth Amendment of the

United States Constitution. All of the questions raised now by Howard Johnson were answered by the jury in their initial verdict, or could have been answered by the jury as requested by Petitioner's legal counsel, prior to the jury's dismissal by the Trial Judge.

Since Howard Johnson has admitted that Beckner developed the ice cream formulas (Counter Statement of the Case, page 1) it seems clear that the jury's verdict was sound and correct.

The claim by Howard Johnson, that there is no evidence that Beckner planned to limit, restrict or deny Howard Johnson the use of his formulas is not consistent with Beckner's decision to deny two previous employers the use of his formulas, prior to his employment with Howard Johnson. This decision by Beckner resulted in a

subsequent loss of ice cream business for those firms, and are evidence of Beckner's intent to deny Howard Johnson further use of his formulas after completion of his employment contract.

Beckner lost personal control of his early formulas after he sustained a work related injury while on a business trip to a Howard Johnson ice cream plant in Florida to inspect production and quality control of ice cream being produced in a warm climate. He altered his formulas to conform with the climates in different marketing areas.

The fact that the Massachusetts Supreme Judicial Court denied further Appellate Review of an apparent unanimous jury verdict is the basis of Connors' claim of her Due Process rights under the Fourteenth Amendment.

The Jury, after examining the

evidence and hearing witnesses for five and a half days, decided that there was a relationship of trust and confidence between Paul Beckner and Howard Johnson as was demonstrated by the employment contract of 1958 and the employment contract of 1951, which was different from other employment contracts introduced as evidence between Howard Johnson and any other employees. All employment contracts between Howard Johnson and its employees were held in a repository in Company Attorney Eugene Durgin's office in Braintree, Mass.

Each of Howard Johnson's briefs in opposition further support the jury's verdict.

The claim by Howard Johnson that the Petition for a Writ of Certiorari should be denied because the specific Federal issues were not raised in a

timely manner is disproved by Exhibit C. The Clerk of the Massachusetts Supreme Judicial Court (M.S.J.C.) stamped the wrong date of July 17, 1991 on the motion for a rehearing mailed July 3, 1991 and received by the (M.S.J.C.) on July 5, 1991 by certified mail. The claim that the Petition to this court seeking a Writ of Certiorari was untimely was answered personally by Justice Souter by order of the Court. It seems that Howard Johnson doesn't believe that Justice Souter understands the rules of the Supreme Court.

Until the (M.S.J.C.), denied to grant further Appellate Review no Federal question needed to be raised since the (M.S.J.C.) could have ruled that Connors' Seventh Amendment rights were violated by the Massachusetts Appeal Court on a different finding than

the Trial Court and upheld by the jury verdict.

The primary issues of law were resolved by the decisions of Judges Quirico, Tuttle and Rouse as can be determined by the fact that this case was allowed to go to a jury following a mock trial.

The uniqueness of this case comes from the fact that an employee brought trade secrets to his employer including formulas, processes and procedures for making ice cream.

This case differs from another case cited but is most closely analogous to Peggy Lawton Kitchens, Inc. v. Hogan 18 Mass. App. Ct. 937, 939, (1984), and Jet Spray Cooler v. Crampton, 361 Mass. 835 (1973), Businesses established by employees using formulas and processes stolen from their previous employers.

The decision held in E. W. Bliss v. United States, 63 L. ed. 114, the U. S. Supreme Court stated "the case is precisely analogous to a suit to enjoin the unauthorized use or disclosure of a trade secret." Justice Van Devanter stated in Baltimore & Carolina Line v. Redman, 295 U. S. 660, "but whatever may have been its origin or theoretical basis, it was well established when the Seventh Amendment was adopted, and therefore, must be regarded as a part of the common-law rules to which resort must be had in testing and measuring the right of trial by jury as preserved and protected by that Amendment." Baltimore & Carolina Line also held that "issues of law are to be resolved by the court and issues of fact are to be determined by the jury under appropriate instructions by the court."

CONCLUSION

In conclusion, it has been established by the jury that there was a relationship of trust and confidence between Howard D. Johnson and Paul H. Beckner so that Howard Johnson was restrained by the relationship under which it acquired the earlier formulas.

For the reasons stated previously, and affirmed by the jury, the verdict should be upheld and the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Elaine A. Beckner Connors

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SUPREME COURT OF THE UNITED STATES

No.

A-610

Elaine A. Connors,

Petitioner

v.

Howard Johnson Company

ORDER

UPON CONSIDERATION of the application of the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including March 27, 1991.

/s/David H. Souter
Associate Justice of the Supreme Court
of the United States

Dated this 20th day of February, 1992.

SUPREME JUDICIAL COURT

Boston, Massachusetts 02108

Edward M. Tumavicus

Legal Counsel to the

Chief Justice

4 May 1992

Elaine A. Beckner Connors

103 Brookfield Drive

Brockton, MA 02402

Dear Mrs. Connors:

Chief Justice Liacos has asked me to review and respond to your letter of April 27,1992, regarding your request for further appellate review.

With respect to your request for clarification of the date that your 1991 request for reconsideration was received by the Supreme Judicial Court,

you are correct that the July 17, 1991, time stamp on that document does not reflect the date the request was received by the Supreme Judicial Court. The time stamp reflects the date that the request was received by the Clerk's Office for the Commonwealth from the Office of the Administrative Assistant to the Justices of the Supreme Judicial Court. An internal Supreme Judicial Court memorandum from John Burke to Clerk Kennett, a copy of which you have included in the materials you sent to Chief Justice Liacos, reflects that the request was received by the Court on or before July 12, 1991. Unfortunately, the Clerk's office for the Commonwealth has been unable to locate any records indicating the exact date on which your request was received by the Court.

In your April 27, 1992, letter to

Chief Justice Liacos, you also have requested that the Court reconsider your application for further appellate review. The basis for this request appears to be your belief that the Court denied your 1991 request for reconsideration because it treated the request as not timely filed. The records of the Clerk's Office for the Commonwealth reveal, however, that your 1991 request was given full consideration by the Court and was denied on substantive grounds, rather than on any issue of timeliness.

I hope that this information has been helpful. Please be aware that your April 27, 1992, letter has not been treated as a request for reconsideration. If you wish to bring such a request to the Court, please file your motion directly with the Clerk's

Office for the Commonwealth.

Sincerely,

Edward M. Tumavicus

EMT:jeh

cc.: Francis C. Lynch, Esquire
Palmer and Dodge
One Beacon Street
Boston, MA 02108

C1

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SUPREME JUDICIAL COURT
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